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ARKANSAS COURT OF APPEALS

DIVISIONS III & IV
No. CA11-980

Opinion Delivered April 4, 2012

CHARLES S. WILSON AND JANICE B. WILSON, HUSBAND AND WIFE
APPELLANTS

V.

MARY S. GRAF, TRUSTEE OF THE MARY S. GRAF LIVING TRUST
APPELLEE

APPEAL FROM THE VAN BUREN COUNTY CIRCUIT COURT
[NO. CV-05-191]

HONORABLE CHARLES E. CLAWSON, JR., JUDGE

AFFIRMED

JOSEPHINE LINKER HART, Judge

Mary Graf, as trustee for the Mary S. Graf Living Trust, and Charles and Janice Wilson executed a real-estate contract memorializing Mrs. Graf's sale to the Wilsons of "470 Mountain Ranch Dr[ive]" in Fairfield Bay, Arkansas. At the closing of the sale, Mrs. Graf executed a warranty deed conveying two lots, designated as Lots 20 and 21, to the Wilsons. Mrs. Graf later filed suit seeking reformation of the deed to reflect that she conveyed only Lot 21 to the Wilsons. After trial, the court issued an order finding that Mrs. Graf "has shown by clear and convincing evidence that the parties (Graf and the Wilsons) were mistaken as to what they were buying and selling in the sale of 470 Mountain Ranch Drive" and granting Mrs. Graf's "request for reformation." On appeal, the Wilsons assert that the circuit court's decision to reform the deed was clearly erroneous because there was not a mutual mistake, as the Wilsons intended to buy all the property Mrs. Graf owned. We affirm.

Mrs. Graf testified that she and her husband built a house on Lot 21 in 1991. They

later acquired Lot 20. Mrs. Graf's husband died, and she later sought to sell her residence and Lot 21, but not Lot 20, and prepared a flyer showing that she was selling the residence and Lot 21. Janice Wilson came to view the residence and, according to Mrs. Graf, was given that flyer. Mr. Wilson later visited the residence. Mrs. Graf testified that Mr. Wilson asked about the adjacent lot and that she told him she owned it. Mrs. Wilson, however, testified that she did not recall receiving the flyer, and Mr. Wilson also denied that he received the flyer. Mr. Wilson further denied that Mrs. Graf told him that she owned an adjoining lot that was not for sale.

Mrs. Graf testified that the Wilsons did not examine the lot lines. The parties then executed a real-estate contract for the sale of "470 Mountain Ranch Drive" for $220,000. Mr. Wilson testified that when he signed the contract, he did not know how many lots he was purchasing and that he was "the most disinterested house buyer that's ever lived." He further testified that he did not care whether the property consisted of a half-acre, one acre, one lot, one and one-half lots, or two lots. Mrs. Wilson testified that she never looked at the lot lines, that she did not know how many lots were involved, and that she primarily looked at the residence. The Wilsons then applied for a bank loan. The loan application referenced the street address and Lot 21. The accompanying appraisal also referenced the street address and Lot 21. The appraisal identified the value of Lot 21 as approximately $25,000 and noted that it consisted of approximately three-tenths of an acre.

The closing agent testified that immediately prior to closing, she discovered that Mrs. Graf owned two lots. The closing agent told Mr. Wilson that Mrs. Graf had two lots and asked him what he was buying. According to the closing agent, Mr. Wilson said, "I'm buying

what she has." Mr. Wilson testified that prior to closing he knew there were two lots. He also testified that at the closing he knew there were two lots as pointed out by the closing agent but that the closing agent did not call him and that he did not recall anyone calling him prior to closing. A deed was prepared reflecting the conveyance of both lots. At the closing, Mrs. Graf signed the deed. Mrs. Graf testified that she later discovered that the deed conveyed both lots and sought reformation of the deed. She further testified that the purchase price of Lot 20 was $27,000.

The Wilsons contend that there was not a mutual mistake and that they intended to buy all the property Mrs. Graf owned. Particularly, they note their own testimony that they did not review any flyer from Mrs. Graf, that they were never told the sale did not include Lot 20, and that they did not inspect the boundaries of the property. They assert that there was no fence or marker between the lots. They note that the real-estate contract only referenced a street address and did not provide a property description. They further note that the closing agent testified that, when she apprised Mr. Wilson that Mrs. Graf owned two lots, he told her that he was buying what Mrs. Graf had and that the closing agent also testified that she read to Mrs. Graf the contents of the deed as well as other documents. The Wilsons further assert that, as testified to by Mr. Wilson, the property description on their loan application, which referenced only Lot 21, was furnished by the bank and that they did not intend to limit their purchase.

When a description in a deed embraces lands that the seller did not intend to sell and the buyer did not intend to buy, its inclusion in the deed is the result of a mutual mistake of the parties and may be corrected by reformation. *Rockett v. Rockett*, 2011 Ark. App. 159.

Reformation is available when the parties have reached a complete agreement but through mutual mistake the terms of their agreement are not correctly reflected in the written instrument purporting to evidence the agreement. *Id.* A mutual mistake is one that is reciprocal and common to both parties, each alike laboring under the same misconception in respect to the terms of the written instrument. *Id.* The evidence necessary to justify a reformation based on mutual mistake need not be undisputed. *Id.* Whether a mutual mistake warranting reformation occurred is a question of fact, and on appeal, this court determines whether the circuit court's findings are clearly erroneous, deferring to the superior position of the circuit court to evaluate the evidence. *Id.*

The factual question raised on appeal by the Wilsons and decided against them at trial was whether they intended to buy only Lot 21 or both Lot 20 and Lot 21. A purchaser's insistence that he meant to buy whatever was described in a deed is not in itself necessarily sufficient to preclude a finding that a mutual mistake occurred. *Warner v. Eslick*, 239 Ark. 157, 388 S.W.2d 1 (1965). While the closing agent testified that Mr. Wilson stated to her that he intended to buy what Mrs. Graf had, this testimony is ambiguous and does not reflect that the Wilsons believed, when they entered into the contract or when Mrs. Graf executed the deed, that they were purchasing real property beyond the site of the residence, Lot 21. Rather, the circuit court had before it testimony that the Wilsons did not walk the boundaries and that the Wilsons were not concerned about the amount of property they were purchasing. The Wilsons applied for a loan for only Lot 21 and the residence, obtained an appraisal for Lot 21 and the residence, and did not provide any additional consideration for Lot 20, which Mrs. Graf valued at $27,000. We defer to the circuit court's evaluation of the evidence, and this

evidence supports the circuit court's finding of mutual mistake in that the Wilsons labored under the misconception that the deed reflected what Mrs. Graf intended to sell and what they intended to purchase. Thus, we cannot say that the circuit court's finding of mutual mistake was clearly erroneous.

Affirmed.

VAUGHT, C.J., and GRUBER, MARTIN, and HOOFMAN, JJ., agree.

BROWN, J., dissents.

BROWN, J., dissenting. I must respectfully dissent from the majority holding in this case.

The majority emphasizes evidence that at the time the initial real-estate-offer contract was entered, the Wilsons did not have a clear idea as to how much land was included in the property they were buying. However, the circuit court assessed the evidence and credibility of the witnesses and found that at some point leading up to the closing, Graf and the Wilsons became "confused" and formed different ideas about what was being bought and sold. That finding conforms to the evidence. However, it is simply not mutual mistake.

A mutual mistake is one that is reciprocal and common to both parties, each alike laboring under the *same* misconception in respect to the terms of the written instrument.[1] A mutual mistake must be shown by clear and decisive evidence that, at the time the agreement

[1]*Lawrence v. Crafton*, 2010 Ark. App. 231, 374 S.W.3d 224; *Lambert v. Quinn*, 32 Ark. App. 184, 798 S.W.2d 448 (1990).

was reduced to writing,[2] both parties intended their written agreement to say one thing and, by mistake, it expressed something different.[3] In this case, for a mutual mistake to have occurred, the parties would have to have been laboring under the same misconception; that is, that the property Graf intended to sell was the same property the Wilsons intended to buy. However, the circuit court in this case found (and the evidence overwhelmingly shows) that Graf and the Wilsons had different conceptions of the extent of the property for sale.

The circuit court believed that "confusion occurred" between the parties when, during preparations for closing, the title company called Mr. Wilson and told him both Lots 20 and 21 were to be included in the sale.[4] The court then noted that various documents gave

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[2]The analyses in cases addressing mutual mistake make it clear that "the time the agreement was reduced to writing" refers to the time the deed was executed—that is the moment of intent from which the analysis flows. *See, e.g.*, *Hope v. Hope*, 333 Ark. 324, 969 S.W.2d 633 (19998); *Falls v. Utley*, 281 Ark. 481, 665 S.W.2d 862 (1984); *Rockett v. Rockett*, 2011 Ark. App. 159; *Lambert*, *supra*. Expressions of intent made at other points, whether by a conditional preliminary agreement (such as the real-estate-offer contract in this case), verbal statements, or actions consistent with belief of ownership, are examined to determine what the intent of each party was at the time they executed the deed. *Id.*; *see also Warner v. Eslick*, 239 Ark. 157, 388 S.W.2d 1 (1965).

[3]*Lawrence*, *supra*.

[4]As noted in the majority opinion, when told that the property being sold encompassed two lots, Mr. Wilson stated that he wanted to buy whatever property Graf owned at the location. Mr. Wilson testified that prior to closing, he came to understand that two lots were involved and he intended to buy both of them, and Mrs. Wilson testified that she and her husband would not have gone through with the closing if they had known that there was an adjoining lot that Graf did not intend to sell. In addition, Mr. Wilson testified that while he and his wife have lived in the house, he removed about twelve small trees in order to get a better view of the golf course adjacent to the property, and has mowed the grass on Lot 20. This behavior is consistent with a belief that the property had been conveyed to him and his wife. In reformation cases, behavior that is consistent or inconsistent with a belief of ownership is often considered as evidence of what a party actually intended at the time he executed the deed. *See, e.g.*, *Hope*, *supra*; *Rockett*, *supra*; *Lambert*, *supra*.

different descriptions of the property to be conveyed:

> The Court . . . believes that Ms. Washington explained to all parties the content of the [closing] documents, specifically that the warranty deed executed by Ms. Graf which called for the conveyance of Lots 20 & 21 and the seller's affidavit which clearly states that Lots 20 & 21 are being conveyed. These are equally as clear as the loan application executed by the Wilson's [sic] which describes only Lot 21.

The circuit court ultimately found that, as a result of these inconsistencies,

> [i]t is clear that Ms. Graf [wished to sell] and Mr. Wilson wished to buy the property located at 470 Mountain Ranch Drive. It has been shown however by clear and convincing evidence that the parties were mistaken as to what they were buying and selling which actually constituted 470 Mountain Ranch Drive.

The circuit court's opinion clearly shows that the court believed mutual mistake to be a situation where the seller intended to sell on thing and the buyer intended to buy another; that is, Graf and the Wilsons were confused about what constituted 470 Mountain Ranch Drive. But what the circuit court is actually describing is no meeting of the minds, or the lack of a complete agreement. That is *not* the same thing as mutual mistake: a deed can only be reformed for mutual mistake when a complete agreement has been reached.[5] Regardless of how we feel about the outcome for these parties, we should not affirm such a finding because it is contrary to the law.

John C. Aldworth, for appellants.

R. Bryan Tilley, for appellees.

[5] *Lawrence v. Crafton*, *supra*.